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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1931

No. 826

ED SPROLES ET AL., APPELLANTS,

vs.

T. BINFORD ET AL., APPELLEES.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF TEXAS.

BRIEF FOR APPELLEES.

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BRIEF FOR APPELLEES.

Opinions.

The opinion of the statutory three-judge court denying the temporary injunction (R. 103) is reported in 52 Fed. (2d) 730 and the final opinion on the merits (R. 119) is not yet officially reported.

The Statutes and Questions Involved.

The act in question (Chapter 282, 42nd Texas Legislature) became effective August 22, 1931, with the exception of the net load limit of 7,000 pounds, which took effect January 1, 1932. It limits the height, width, length, net load and speed of motor vehicles operated on the public highways and makes several requirements with respect to brakes, lights and other appliances in the interest of safety.

For the convenience of the Court, and in view of the fact appellants have paraphrased the terms of the Act, we quote its pertinent provisions:

> "SECTION 2. It shall be unlawful * * * for any person to * * * operate * * * on any highway, any vehicle * * * exceeding the limitations stated in this act * * * or to transport thereon any load or loads exceeding the dimensions or weight prescribed in this act; provided the Department, acting directly or through its * * * agents designated in each county shall have and is hereby granted authority to grant permits limited to periods of ninety (90) days or less for the transportation * * * of such overweight or oversize or overlength commodities as cannot be reasonably dismantled or for the operation * * * of superheavy and oversize equipment for the transportation of such * * * commodities as cannot be reasonably dismantled; provided, that any haul or hauls made under such permits shall be made by the shortest practicable route; * * * (they) may require a bond to be executed * * * in such amount as will guarantee the payment of any

damages which any road or bridge * * * may sustain in consequence of the transportation aforesaid.

"SECTION 3. (*a*) No vehicle shall exceed a total outside width, including any load thereon, of ninety-six (96) inches, except that the width of a farm tractor shall not exceed nine (9) feet, and except further, that the limitations as to size of vehicle stated in this section shall not apply to implements of husbandry, including machinery used solely for the purpose of drilling water wells, and highway building and maintenance machinery temporarily propelled or moved upon the public highways.

"(*b*). No vehicle unladen or with load shall exceed a height of twelve feet six inches (12′ 6″) including load.

"(*c*). No motor vehicle, commercial motor vehicle, truck-tractor, trailer, or semi-trailer shall exceed a length of thirty-five (35) feet, and no combination of such vehicles coupled together shall exceed a total length of forty-five (45) feet, unless such vehicle or combination of vehicles is operated exclusively within the limits of an incorporated city or town.

"(*d*). No train or combination of vehicles or vehicle operated alone shall carry any load extending more than three (3) feet beyond the front thereof, nor, except as hereinbefore provided, more than four (4) feet beyond the rear thereof.

"(*e*). No passenger vehicle shall carry any load extending more than three (3) inches beyond the line of the fenders on the left side of such vehicle, nor extending more than six (6) inches beyond the line of the fenders on the

right side thereof; provided, that the total over-all width of such passenger vehicle shall in no event exceed ninety-six (96) inches, including any and all such load.

"(f). * * * it shall * * * be unlawful for any person to operate * * * any motor vehicle or combination thereof over the highways of this State which shall have as a load or as a part of the load thereon any * * * commodity * * * which is contained, boxed or bound in any container, box or binding containing more than thirty (30) cubic feet and weighing more than five hundred (500) pounds where there are more than fourteen (14) of such containers, boxes or bindings being carried as a load on any such vehicle or combination thereof; provided, that no number of any such containers, boxes or bindings shall be carried as the whole or part of any load exceeding seven thousand (7,000) pounds on any such vehicle or combination thereof; * * *.

"SECTION 5. No commercial motor vehicle, truck-tractor, trailer or semi-trailer shall be operated on the public highways outside the limits of an incorporated city or town with a load exceeding seven thousand (7,000) pounds on any such vehicle or train or combination of vehicles; and no motor vehicle, commercial motor vehicle, truck-tractor, trailer or semi-trailer having a greater weight than six hundred (600) pounds per inch width of tire upon any wheel concentrated upon the surface of the highway shall be operated on the public highways outside of the limits of an incorporated city or town; provided, however, that the provisions of this section shall not become effective until the first day of January, 1932.

"SECTION 7. The limitations imposed by this act as to length of vehicle or combination of vehicles and weight of loads and of height of vehicle with load shall not apply to vehicles when used only to transport property from point of origin to the nearest practicable common carrier receiving or loading point or from a common carrier unloading point by way of the shortest practicable route to destination; provided, said vehicle does not pass a delivery or receiving point of a common carrier equipped to transport such load, or when used, to transport property from the point of origin to point of destination thereof when the destination of such property is less distant from the point of origin thereof than the nearest practicable common carrier receiving or loading point equipped to transport such load; provided, however, that in no event except by special permit, as hereinabove specifically provided, shall the length of said vehicles exceed fifty-five (55) feet or the weight of such loads exceed fourteen thousand (14,000) pounds; and provided further, that the limitations imposed by this act upon weight per inch width of tire shall apply to all such vehicles and loads; * * * (R. 7-14)."

The questions raised by appellants' assignment of errors are:

1. Is the limitation of the net load to 7,000 pounds (Sec. 5) related to highway protection, conservation and traffic safety (Assignment I, R. 407)?

2. (a) Is there any reasonable basis for the classification made in Section 7 permitting a maximum load of 14,000 pounds on short hauls from points of origin

to common carrier receiving stations or from common carrier unloading points to destination by the nearest practicable route (Assignment IIa, R. 407)?

(*b*). Is the 7,000 pound load limit prescribed for trucks carrying property discriminatory because it does not apply to motor busses carrying persons (Assignment IIb, R. 407)?

3. Does the limitation of load to 7,000 pounds (Sec. 5) place an undue burden upon interstate commerce (Assignment III, R. 407)?

4. Is Section 3(*f*) limiting to fourteen the number of units of commodities which may be transported when such commodities are boxed or bound-in such manner as to exceed 30 cubic feet in volume and weigh more than 500 pounds, and limiting the load in all events to 7,000 pounds when one or more such units forms a part of the load, unreasonable and discriminatory, and especially when the classification is considered in connection with the general load limit of 7,000 pounds prescribed by Section 5 (Assignment IV, R. 408)?

5. Is Section 2, prohibiting the operation of motor vehicles exceeding the dimensions prescribed by the act, discriminatory because it does not apply to farm tractors, implements of husbandry, water-well and highway construction machinery which are only temporarily and occasionally upon the highways, or is it discriminatory because, as is provided in Section 7, it does not apply to the short hauls between common carrier unloading stations and points of destination or vice versa (Assignment V, R. 408)?

6. Is Section 2, making it the administrative duty of certain designated state officers to issue special permits for the transportation of oversize or overweight commodities which cannot reasonably be dismantled, and for the use of oversize equipment when necessary for such transportation, void because violative of the equal protection or due process clauses of the United States Constitution, or because it contravenes the Texas Constitutional prohibition that "no power of suspending laws in this State shall be exercised except by the Legislature" (Assignment VI, R. 408)?

7. Was it error, because hearsay, to admit, over appellant's objection, testimony relating to the safe load limit of bridges on public highways which testimony was based upon the witness' examination of official records of the State Highway Department; and was such error, if any, harmful, in view of the fact that the case was heard before the court without a jury; and in view of the further fact that there was testimony from other witnesses to the same effect, to which no objection was raised, and there being nothing in the record to show what effect, if any, the testimony objected to had upon the judgment of the court (Assignment VII, R. 409)?

8. Do Sections 5 and 2, limiting the load and dimensions of trucks, impair the obligation of contracts, contrary to Article I of the Constitution of the United States, merely because prior to their enactment appellants contracted to carry greater loads than now permitted or use equipment exceeding the prescribed dimensions (Assignment VIII, R. 409)?

In each instance the court below decided against the contention of the appellants and in favor of the validity of the law.

Statement.

The immense area of Texas requires approximately 200,000 miles of public highways to connect its various communities (R. 310, 133-4). Its centers of population are so widely separated and the distances between them so great that the State and counties have not been financially able to construct a complete system of improved roads (R. 362). Consequently, it has been necessary to limit to the absolute minimum the number of trans-state roads of the higher grade capable of sustaining heavily loaded vehicles. There is not a single trans-state highway which is consistently of one type of construction. This is true of nearly all highways between the larger cities of the State (R. 310).

The trial court in its findings of fact (R. 134-5) stated

> "that there are highways of concrete and other rigid and semi-rigid types of construction and also bridges capable of carrying a greater load than 7,000 pounds but * * * they do not form a regular connected system and are scattered throughout the state; * * * these better types of construction are connected and joined by constructions of a lower or inferior type; transportation must conform itself generally to these conditions. * * * There are in this system all types of roads ranging from dirt, gravel, shell, asphalt and bitulithic to concrete and brick highways of varying degrees of

> strength; * * *. H. B. 336 was enacted * * * in the interest of the whole state for the benefit of the state in general and for the protection of the traveling public and the state highway system in particular, * * *."

The state and the several counties have expended hundreds of millions of dollars of public funds in the construction of their highways (R. 133-4). To bring this system up to the modern type of rigid construction necessary for excessive loads would cost approximately $500,000,000 (R. 310). This cost cannot be borne by the people (R. 362).

Due to the limited number of cardinal highways of rigid or improved type, traffic congestion has become a most serious problem. Naturally, because of their improved condition, traffic in unprecedented volume has flowed into them rather than taking the roads of inferior character (R. 311-12).

Within the past six years the number of trucks in use on the highways of Texas has increased 300 per cent, there having been 206,000 registered in 1930 (R. 135, 343). This does not include the tremendous increase in interstate trucks. During the past three years truck traffic has increased in density from 40 per cent to 500 per cent on the various highways of Texas (R. 136, 344).

This extraordinary use of the State's highways presented serious problems. First, was the fact that heavy trucks were destroying highways which had cost millions to build. The money used to construct them had been borrowed for long periods of time and the

taxpayers faced the prospect of having their roads destroyed many years before they had paid for them (R. 364-5).

Again, there was an excessive maintenance cost which had resulted from heavy truck traffic. It cost the State an average of $12,000,000 per year for the past three years for maintenance of State Designated Highways alone.[1] This figure does not include the maintenance cost of the counties for more than 180,000 miles of county highways. There was an annual carrying charge for State designated highways conservatively estimated at $27,000,000 (R. 290-1).

Not only did this unusual truck traffic destroy the highways and result in an excessive and burdensome expenditure of public funds, but the unusual dimensions, weight and speed of trucks and density of traffic greatly endangered the lives and property of those who were entitled to use them in the ordinary and usual way.

Faced with the imperative necessity[2] of acting in the public interest without further delay, the 42nd Legislature of Texas adopted the Act in question. Being without sufficient means to bring its vast system

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[1] Out of a total of approximately 200,000 miles of highways only 18,527 miles are State Designated Highways (R. 302-310).

[2] During the past seven months, numerous attacks have been made upon this Act and other acts which were enacted by the 42nd Legislature of Texas. The following quotations are taken from opinions of three-judge statutory courts hearing the cases, and describe the traffic conditions upon the highways of Texas which were disclosed at the trial of the cases:

of roads up to a standard sufficient to sustain excessive loads, the Legislature adopted the only other course which was open to it of limiting the load to a point which would be reasonable, having in mind the State highway system as a whole.

It is but natural that regulations of the character contained in the Act would result in hardships on a few. In the case of trucks it was shown that less than three per cent of those registered in Texas had a rated carrying capacity in excess of 7,000 pounds (R. 288). Nevertheless, the Governor of Texas in recommending this measure to the Legislature, suggested that a reasonable time should be allowed to dispose of trucks the use of which would be prohibited or rendered uneconomical by its limitations (R. 364). His suggestion was followed, for, while the other provisions of the Act became effective August 22, 1931, the weight limit did not become operative until January 1, 1932.

"Faced with the grave necessity of adequately regulating motor traffic on the highways of Texas in the interest at once of the safety of the traveling public, the protection of the highways, and the maintenance of a safe and dependable transportation system, both by rail and by road, for the people of the State, the Forty-second Legislature of Texas, at its regular session, enacted into law a legislative program designed and comprehensive enough to deal with and to remedy the mischiefs incident to unregulated use of the highways, including those arising from the unprecedented use of the highways by

Considerations of public welfare and necessity required the Legislature to exclude from the general limitations of the Act certain limited and special operations for particular purposes. Certain of them do not apply within the corporate limits of cities that construct and maintain streets at their own expense. Each of these classifications, as found by the court below, is reasonable and is based upon facts which justify it.

This controversy arose because appellants were operators of trucks and combinations thereof exceeding the dimensions prescribed by the Act and desired to carry loads in excess of those allowed by it. While they attack the classifications which are made by it, their chief complaint, if indeed it is not their entire complaint, is against the net load limit of 7,000 pounds. As will be demonstrated, in the case of each classification against which complaint is made, appellants have

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private contract carriers for hire." *Stephenson* vs. *Binford et al.*, 53 F. (2d) 509.

"So circumstanced, plaintiffs on the issue of the basis of classification have a burden too heavy to be borne, when, in addition to the presumptions which exist in its favor, they are confronted by affidavits offered by defendants which, taken separately and as a whole, with other specific instances of traffic congestion, injury to the highways and to person and property moving thereon, of fire hazard and of load spillings attendant upon the movement of cotton over the highways, together with proof as to its characteristic package or packages * * * the size of loads, the seasonal and congested character of the movement, not only strongly sup-

shown neither injury resulting from such classifications, nor that they cannot avail themselves of any benefits which may result from them.

The original bill was filed on August 18, 1931, four days before the effective date of the Act. The interventions were filed shortly thereafter. Both at the hearing for a temporary injunction and at the trial on the merits, the three-judge court sustained the validity of the law, and at the final hearing dismissed the bill for want of equity (R. 116, 125). Hence this appeal.

Appellants variously are engaged in intrastate and interstate commerce and are common and contract carriers for hire. One is a carrier of cotton for hire and one uses trucks in his own business. Thus the law has been fairly tested from all angles.

Summary of Argument.

1. That a state may limit the net load of motor trucks using its highways in the interest of highway

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port, but in our opinion, as the matter stands on the proofs adduced at this hearing, put beyond question the general power of the Legislature to deal with cotton in its use of the highways * * *." *J. H. McLeaish & Co.* vs. *T. Binford et al.*, 52 F. (2d) 151.

"The testimony supports the finding of the Legislature that highway traffic has increased tremendously; that the hazards and dangers of such highways for the public are almost appalling. The wording of the law indicates that the Legislature had in mind the relief of the situation" *H. B. Sage et al.* v. *H. John Baldwin et al.*, 55 F. (2d) 968.

protection and conservation and traffic safety is definitely settled by *Morris* v. *Duby*, 274 U. S. 139. The trial court found that Section 5, limiting the net load to 7,000 pounds, is reasonable, and that such limitation is directly related to these objects. The testimony of record supports these findings. In this state of the record, this court will not substitute its judgment for that of the Legislature and the court below. *Standard Oil Co.* v. *City of Marysville*, 279 U. S. 583.

2. (*a*) Section 7 permits a maximum load of 14,000 pounds to and from points of origin or destination and common carrier stations, including common carrier truck stations. The record and findings show this to be universally a short haul, averaging a little more than four miles per haul for the entire state. The practical necessities of the people require this classification. Instead of adding to highway congestion and damaging the highways, it reduces both, without subjecting the highway system as a whole to the use of overweight and oversize vehicles. The exception is based on the substantial differences between a short haul for a limited purpose and a general use of the highways. The distinction here made is based upon use made of the highways, rather than upon vehicles or persons using the same. *Clark* v. *Maxwell*, 282 U. S. 811; *Continental Baking Co.* v. *Woodring*, 55 Fed. (2d) 347; *Lindsey* v. *Natural Carbonic Gas Co.*, 220 U. S. 61.

(*b*) Where it was shown that there are 206,000 trucks carrying property and only 900 motor busses carrying persons upon the highways, that there are substantial differences in their manner of operation

and that motor busses are less dangerous to the traveling public, and less damaging to the highways, the Legislature is justified in distinguishing between them. *Lindsley* v. *Natural Carbonic Gas Co., supra; New York, New Haven & Hartford R. R. Co.* v. *New York,* 165 U. S. 628.

3. The limitation of load on trucks using public highways is an exercise of the State's police power. Such regulations, when uniformly applied to all classes of commerce, do not cast an undue burden upon interstate commerce when enforced against an interstate operation. *Clark* v. *Poor,* 274 U. S. 554; *Morris* v. *Duby, supra.*

4. Section 5 limits the net load to 7,000 pounds. Section 3(*f*) has exactly the same effect, because it prohibits the transportation of more than 14 bundles, bales or boxes weighing more than 500 pounds each and exceeding in volume 30 cubic feet each. The provision that a load, under this section, shall in no event exceed 7,000 pounds when any part of it is made up of such a bale, bundle or box, does not modify the load limit in the slightest degree. One transporting under either section is limited to 7,000 pounds. Hence the question is moot and a decision of it is unnecessary to a disposition of this case. *United States* v. *Alaska Steamship Co.,* 253 U. S. 113.

5. Section 3 permits the temporary movement over the highways from farm to farm or from place to place, of implements of husbandry, water well drilling machinery and highway construction machinery. This

use is limited to the movement of the implements and machines themselves, without loads, and then only for the purpose of using them in husbandry, drilling water wells or maintaining and constructing highways, respectively. This section has been so construed by the State court of last resort, the Court of Criminal Appeals of Texas, in *Cecil Reaves* v. *State of Texas*, 40 S. W. (2d) 150. The limited use authorized by these classifications, and the dissimilarity between such use and that of motor trucks making a general use of the highways, is sufficient basis for them. *Lindsley* v. *Natural Carbonic Gas Co., supra.*

Paragraph 2 of this summary is referred to as a justification for the length exception made in favor of short hauls to and from points of origin and common carrier stations.

6. Section 2 makes it the duty of certain State officers to issue special permits for the transportation of overweight or oversize commodities which cannot be reasonably dismantled. This provision makes it possible for the State to allow the movement of such necessary commodities as telephone poles, electric transformers, boilers and the like, under strict supervision and over routes designated, where least damage will result to the highways. Such officers are only authorized to issue permits where the commodity can not be reasonably dismantled. In the performance of this duty they are acting in a fact-finding capacity. The section clearly defines their duty, and lays down a definite standard by which to determine whether a permit shall or shall not be issued. If the commodity

cannot be reasonably dismantled, such a permit shall issue; if it can, then it shall be denied. Such a provision does not suspend the legislative will nor does it delegate legislative authority. *Union Bridge Co.* v. *United States,* 204 U. S. 364; *Trimmer* v. *Carlton,* 116 Tex. 591, 296 S. W. 1070.

7. It is not error, because hearsay, to admit the testimony of an expert witness relative to calculations and compilations which were made by him from a personal examination of voluminous official records. This is especially true when the fact to be proved consisted of a general result which could be ascertained only by such calculations. Under such circumstances, the originals need not be produced unless the court deems it necessary. *Jones Commentaries on Evidence,* 2nd Ed., p. 1452, Sec. 787; *Burton* v. *Driggs,* 20 Wall. U. S. 125. Even if the testimony was not admissible over objections, it is harmless error, because the same facts were proved by other witnesses and the record does not show that the court was influenced by it to any degree whatever.

8. Contracts for the transportation of property over public highways are made subject to the inherent power of the State to enact and enforce reasonable regulations in the interest of highway conservation and safety. Such a contract is not protected by Section 10 of Article I of the United States Constitution. *Morris* v. *Duby, supra; Boston Beer Co.* v. *Mass.,* 98 U. S. 25; *Hendricks* v. *Maryland,* 235 U. S. 610.

9. The Act is remedial in nature and should be liberally construed. *United States* v. *Pacific & Arctic Co.*, 228 U. S. 107-8. Where the Legislature clearly expresses the intention that the various provisions of a law may be severed, the presumption of divisibility must be overcome by considerations which make evident their inseparability, or the clear probability that, the invalid provision being eliminated, it would not have adopted that which remains. *Williams* v. *Standard Oil Co. of Louisiana*, 278 U. S. 241. In this case the legislative intent is clearly expressed.

ARGUMENT.

I.

The 7,000-pound load limit prescribed by section five is a reasonable and valid exercise of the police power, and bears a direct and substantial relation to highway conservation and protection, and public safety (in answer to Appellant's Point I.)

Realizing the necessity of prohibiting excessive loads in the interest of highway protection, conservation and traffic safety, the Legislature of Texas chose the net load limit of 7,000 pounds to accomplish its purpose. It could have approached the problem from the standpoint of gross weight of truck and load; but to have done so would have prohibited absolutely the operation of super-heavy equipment then in use in the State.[3]

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[3] Only 5,500 trucks out of a total of 206,000 have a rated carrying capacity in excess of 7,000 pounds (R. 288).

By limiting the net load only, persons owning excessively heavy equipment could continue its use as long as it proved serviceable. Of course, when it should become necessary to replace the same, economy would require the purchase of lighter equipment.[4] Not only was it the desire of the Legislature to do as little injury as possible by limiting the load in the manner prescribed by Section 5 but, as heretofore stated, to be even more reasonable than was necessary, it deferred the effective date of the load limitation for five months after the other provisions of the Act took effect (R. 12).

In this connection the Court found (R. 134, Finding XIX):

> "It is clear that in enacting House Bill 336, the Legislature of Texas found as a fact that 7,000 pounds load weight, plus the weight of the vehicle, is the maximum load that should be allowed to pass over the Texas highways, taking

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[4] Witness W. J. Powell, a civil engineer, and called by complainant as an expert, testified: "The result in reducing the load would be to use lighter trucks (R. 224). I think if you restrict the amount of the load you will restrict the weight of the vehicle hauling it from the economic standpoint of the haul (R. 225). I said it would be a natural tendency in the course of time for the size of trucks to diminish and their weight diminish to adjust themselves to a 7,000 pound load" (R. 226).

Also witness J. F. Rightmire, engineering expert, called on behalf of complainant, testified that if you regulate the net load, you regulate the gross load (R. 230).

> into consideration the manner of past and present construction, probable future construction, cost of maintenance, strength of bridges, condition of traffic, etc. The preponderance of the evidence before us supports and confirms this finding."

In support of the reasonableness of the load limit, the Court found that excessive loads are very damaging to the highways, and that a limitation of load to 7,000 pounds will cause a saving in maintenance cost (R. 136, Finding XXIV). In addition to undue damage, the Court found that the excessive loads caused accidents and that the reduced load fixed by the Act will result in greater safety in the usual and ordinary use of the highways (R. 136, Finding XXV).

In the face of these findings, it would seem that appellants have too great a burden to overcome on their first assignment of error. Their position, as stated, is that the load limitation is unreasonable and arbitrary because it bears no substantial relation to highway protection. The Court's finding on this proposition is as follows:

> "We further find that there is a direct relationship between the net load and gross load of a motor truck, and that the restriction of net load to 7,000 pounds bears a direct relation to highway safety and convenience and highway protection; and we further find that the limitation of the load to 7,000 pounds is reasonable" (R. 137, Finding XXVII).

Thus the load limit is justified not only in the interest of highway protection but, additionally, as a mea-

sure to increase highway safety and convenience, and the Court has found as a fact that the limitation of net load is directly related to each of these desirable ends.

These findings of the Court are supported by the testimony of numerous witnesses. The testimony was undisputed that there are 18,527 miles of State Designated Highways,[5] and of this mileage only 11 percent is of a rigid type; that there are approximately 200,000 miles of highways in the State, and that of this mileage less than one percent is of a rigid type (R. 301-2, 241-2).

The witnesses George A. Knapp, R. A. Thompson and J. M. Howe testified (R. 285, 308, 319-20) that net load bore a very definite relation to gross load and to highway conservation; that a 7,000-pound net load limit is the maximum which may be transported over the highways without undue or excessive damage, except over that small proportion consisting of the modern rigid type; that taking the entire system and viewing it as a whole, a 7,000 pound net load limit is reasonable, and that any higher net load limit would rapidly destroy the highways and result in undue depreciation and burdensome maintenance costs.

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[5] The State has taken over certain highways comprising a system which has been named the State Designated Highway System. They constitute only 11% of the total public highway mileage of the State. State Designated Highways are maintained by the State Highway Department. All other highways, totaling more than 180,000 miles, are maintained by the local county governments (R. 310).

The witness George A. Knapp included in his testimony the specific results of the Bates Road Tests (these are the tests made of the effect of the operation of motor vehicles over the different types of highways, which were conducted under the supervision of the Highway Department of the State of Illinois and under the supervision of the Federal Government) which have formed bases for modern highway construction, and showed, as applied to conditions obtaining in Texas, that any weight permitted in excess of 7,000 pounds net load will result in undue destruction, decreased life and excessive maintenance costs on at least 89 percent of the State Designated Highways, and that such condition will result on 99 percent of all the public highways of Texas (R. 295, 310).

Specific instances of highway destruction, excessive damage to the highways and traffic dangers by reason of a load limit in excess of 7,000 pounds are shown in the testimony of the following witnesses: E. H. Mayr, R. 348; Homer Garrison, R. 350; J. B. Early, R. 345-8; Newt Humphreys, R. 356-8; H. M. Seaman, R. 389; George Shields, R. 391-2; Herman Nehring, R. 397; W. G. Huber, R. 395-6.

J. B. Early, State Maintenance Engineer, conducted an investigation, the result of which established specific instances of damage to the present highways by trucks operating under the former weight limits (R. 345-8).

The witness George B. Shields testified that on a certain highway between Denison and Sherman, of recent and modern concrete construction of the rigid

type, heavily loaded truck traffic moved almost entirely in one direction, and therefore on only one half of the road; that he had made several counts of the breaks in the slabs of concrete on that road; that such counts revealed the fact that practically every slab on the side of the road over which the heavily loaded truck traffic moved was broken and cracked, whereas no breaks of any consequence had occurred on the other half of the road accommodating the empty vehicles and lighter traffic, and that on that portion of the same road which was within the city limits of the City of Sherman, where heavily loaded truck traffic was prohibited by ordinance, no breaks of any consequence existed in the road (R. 391-2).

The witness R. A. Thompson, civil engineer and former State Highway Engineer, testified (R. 310):

> "Taking the entire system now and viewing it for the system as a whole * * * in my opinion a 7,000 pound weight limit is very reasonable."

The witness further testified (R. 308) that the limitation of net load bore a very definite relation to gross load and highway protection.

On that question the witness G. A. Knapp, engineer (R. 285), testified that it was a definite factor in the damage occurring to the highway and that the relationship between them is very direct, very definite and very certain.

Appellants' witness, L. B. Ryon, engineer, admitted when examined by the court (R. 205-6) that there is a relation between net load and highway protection,

and that he could not say what particular number of pounds should be fixed as a limit for the net load. He further stated that he could not ascertain how much load any particular stretch of highway could stand, and that in the end such a limit must be prescribed by some reasonable approximation, and that for some portions of the highways the load prescribed by the Legislature in this Act is going to be too heavy and for some portions, of course, too light.

Reference is also given to the testimony of the following witnesses for the appellants: R. J. Windrow, R. 212; W. J. Powell, R. 221; J. F. Rightmire, R. 230.

In this state of the record, it would seem the only question before the Court on this point is one of state power, for the Court below has found, and the record fully supports such a finding, that there is a direct relationship between net load and highway safety and protection; that the net load limit is necessary for highway protection and safety and that it is a reasonable limitation for the highway system as a whole.

That the Legislature may regulate and limit the weight of vehicles and their loads is settled beyond question. *Morris* v. *Duby,* 274 U. S. 139; *Commonwealth* v. *Mulhall,* 39 N. E. 183, 162 Mass. 496, 44 Am. St. Rep. 387.

Conceding, *arguendo,* that the experts who testified for the appellants have made the reasonableness of the load limit a debatable question, this only raises a difference of opinion and the legislative judgment must prevail. In *Morris* v. *Duby,* supra, where the Oregon load limitation was attacked as unreasonable, and ar-

bitrary, this Court stated that any such contention "is necessarily outweighed when it appears by decision of competent authority that such weight is injurious to the highway for the use of the general public and unduly increases the cost of maintenance and repair. In the absence of any averments of specific facts to show fraud or abuse of discretion, we must accept the judgment of the Highway Commission upon this question which is committed to their decision as against merely general averments denying their official finding."

Here we have the judgment of two competent authorities, the Legislature of Texas and the court trying the case. Moreover, appellants have not nor can they show fraud. Of course, they are in no position to deny the findings of the Court. They do not even except to them.

The State's position is unassailable when viewed in the light of the language employed by this Court in *Standard Oil Company* v. *City of Marysville,* 279 U. S. 583:

> "We need not labor the point, long settled, that where Legislative action is within the scope of the police power, fairly debatable questions as to its reasonableness, wisdom and propriety are not for the determination of courts, but for that of the legislative body on which rests the duty and responsibility of decision."

To sustain appellants' first assignment of error, this Court would have to set aside the findings of the the Court below, findings shown to be supported by the record and supported by the testimony of the appel-

lants' own witnesses, and substitute its judgment for that of the Legislature.

II.

The Act creates no unlawful or improper classifications as between vehicles, commodities or persons, and its classifications are based upon substantial distinctions of fact which justify the Act in its entirety (in answer to Appellants' Point II).

(a) *Section 7, Permitting a Maximum Load of 14,000 Pounds on Short Hauls to and from Points of Origin and Common Carrier Stations, is a Valid Classification Based, upon Substantial Distinctions of Fact, and is not Discriminatory* (in answer to Appellants' first proposition under Point II).

Appellants' first contention under their second point is that Section 5 is discriminatory because Section 7 permits a maximum load of 14,000 pounds on short hauls from points of origin to common carrier receiving stations, and from common carrier unloading points to destination, by the nearest practicable route.

Supporting this classification, the Court made the following finding:

> "We find that the average distance traveled by trucks carrying property from points of origin to common carrier receiving points or from common carrier unloading points to destination is from four to eight miles; that these hauls are universally short; that such operations are confined to small areas and greatly reduce the danger of traffic congestion or highway injury incident to truck transportation; and the

> Court finds that those transporting under the exceptions permitted by Section 7 of the Act do so under distinctly different circumstances and conditions from complainant and intervenors who transport over fixed routes, and from other persons using the highways, and that these differences justify the classification which is made by the Legislature; we find further that this exception will have the effect of diverting from the highways generally a great deal of traffic which will have the effect of reducing highway congestion and danger, and that for this additional reason such classification is just, fair and reasonable" (R. 138, Finding XXXI).

Appellees' witness, R. G. Waggener, Civil Engineer, testified on this point in part as follows:

> "I have made a study of the distances which would have to be traversed over a highway in the State of Texas in order to transport by motor truck goods, wares and merchandise from a common carrier unloading station to any given destination without passing a common carrier unloading station and I have made a study of the distances which would necessarily have to be traversed by motor truck over the highways of the State of Texas to transport a commodity from a given origin to the nearest common carrier receiving station. In making this study I have taken the records of the Railroad Commission of Texas showing the routes of all Class A common carrier motor trucks in the State of Texas and have determined their receiving and unloading stations and I have taken note of the location of the receiving and unloading stations of the common carriers by railroad. I have located the receiving and unloading stations of

both characters of common carriers with reference to all other portions of the State of Texas. In arriving at the areas and their location with reference to common carrier receiving and unloading stations I have taken each and every area within the State of Texas which is surrounded by either common carrier truck or railroad routes, or both, and figured the distances via highway to the nearest common carrier receiving and unloading station (R. 328-9).

* * * * * * *

"My investigation shows that the average haul in West Texas is 8.63 miles and in Central and East and South Texas 3.22 miles. The average for the entire state being 4.35 miles (R. 329).

* * * * * * *

"The combined result of these two considerations makes my average haul 4.35 miles for the entire state conservative, the probabilities being that actual average haul would be materially less than my figures show" (R. 329).

It was further shown (R. 329-30) that carriers generally and appellants in particular operate over routes for long distances. The short haul permitted by Section 7 is a very limited use of the highways and will not contribute to the congestion of the main arteries of traffic. Motor truck traffic generally is conducted over all of the principal highways of the state.

E. C. Kincade, one of appellees' witnesses, testified:

"That 90 per cent of single commodities weighing in excess of 7,000 pounds which cannot be reasonably dismantled are transported by

truck from point of origin to the nearest practicable common carrier loading or receiving point. That in the majority of cases persons who are engaged in the business of and equipped to transport heavy machinery and commodities weighing in excess of 7,000 pounds usually also transport other heavy commodities which are less in weight and size by unit than 7,000 pounds.

"That they usually also transport such commodities only from point of origin to the nearest practicable common carrier receiving or loading point. For instance, practically all pipe line pipe is unloaded from flat railroad cars on trucks and transported to the pipe line being constructed. It seems reasonable, in view of such established practice, to confine heavy equipment and heavy loads to the least practicable portion of the highways provided the heavy equipment can be used to transport pay loads of articles which are of less weight by unit than 7,000 pounds when such vehicles are not being used to transport commodities weighing in excess of 7,000 pounds and which cannot be reasonably dismantled. If, however, equipment large enough to transport single commodities which cannot reasonably be dismantled cannot also be used to transport loads in excess of 7,000 pounds of other commodities from point of origin to the nearest practicable common carrier loading or receiving point and from common carrier loading or unloading point to point of destination by the shortest practicable route, it would practically be impossible to have a means of transportation for such oversize single commodities for the reason that such equipment cannot be maintained solely for that purpose (R. 381).

* * * * * * * *

"Since practically all commodities weighing 7,000 pounds or more are transported from one point of origin to the nearest practicable common carrier loading point and since a major portion of the large trucks necessary to transport such commodities are used within this limited territory such large trucks could be maintained and continued to be operated for this purpose if also permitted to transport loads weighing 14,000 pounds of other commodities of lesser weight per unit within the same limited area (R. 383).

* * * * * * *

"It is generally true that practically all hauling of heavy commodities is conducted in the less congested areas, and it is also true that most of the transportation of heavy commodities by truck is from railroad loading points to destination by the shortest practicable route or from point of origin to the nearest practicable common carrier loading point. Where heavy commodities are transported from point of origin to the nearest practical common carrier loading point in the more congested areas, the distance traversed by truck is always very short. The result is that this class of transportation interferes less with general highway traffic than probably any other class of transportation. For example, pipe lines are usually laid through rural territories away from the highways. Pipe is hauled from the nearest unloading point or siding to the point to which the pipe line has been extended. In most instances a very small percentage of this hauling is done over the public highways." (R. 385.)

The testimony quoted is a clear demonstration of the legislative purpose in making this classification and supports the findings and conclusions of the trial court that it is reasonable and valid. Considerations of public convenience and necessity require it.

As has already been shown, the highest average in any section of the State for such hauls is only eight miles. There are many similar examples of this character of exemption where the distances involved were greater but nevertheless sustained by the courts. A North Carolina statute taxing a carrier for hire operating between fixed termini more than fifty miles apart was sustained by this Court in *Clark* vs. *Maxwell*, 282 U. S. 811. The plaintiff in that case operated between termini some of which were less and some more than fifty miles apart. He attacked the law as discriminatory asserting that there was as much or more highway injury where a dozen trucks operated less than fifty miles as where one truck operated over fifty miles.

Another case in point is that of *Continental Baking Company* vs. *Woodring*, 55 F. (2d) 347, involving an exemption from certain taxes of all private carriers who operated within a radius of 25 miles beyond the corporate limits of a city. The court sustained the exception and cited with approval the opinon of the trial court on this point. In that case, the Court said:

> "While the act is primarily a taxing statute, it does contemplate regulations looking to the public safety. The exemption of the farmer from such regulations can be sustained on the

> familiar ground that he makes but casual use of the highways for transportation of his products. The 25-mile exemption is probably sustainable on the ground that the trucks exempted are domiciled in and generally use the city streets; indeed they must use them to get to the city limits; and such trucks are subject to the control of city authorities in these respects. Again plaintiff's trucks are exempted within this zone as are all others like situated."

In this case the classification is sustainable not only for reasons of public safety and convenience but, further, because it diverts from the highways considerable heavy traffic which they would otherwise be required to carry and reduces their wear and tear. Moreover, this traffic is shown to be of a distinctly different nature from all other movements on the highways.

A legislative classification should stand "if any state of facts reasonably can be conceived that would sustain it." *Lindsley* vs. *Natural Carbonic Co.*, 220 U. S. 61.

Appellants' contention that "this provision is so uncertain and indefinite that it prescribes 'no standard of conduct that it was possible to know,' is not well taken. This court has held that customary places of business and matters of public record may be used in legislative enactments, and need not be described in detail. No law is invalid for uncertainty or indefiniteness where public records or general custom established the plain and unambiguous meaning of the statute, *Waters-Pierce Oil Co.* vs. *Deselms*, 212 U. S.

159. In that case the court applied customary use and general practice to the following term found in an Oklahoma statute: "have not a specific gravity of not less than 46 degrees Baumé." This court changed the above quotation from a negative to an affirmative statement, predicated upon the general and accepted use of a Baumé hydrometer. See also Vol. 36, Cyc. 1136.

Common carrier receiving and unloading stations (both railroad and truck) are established by public records (R. 328-9). The shortest practical route to and from such stations is certainly a matter of common knowledge. This court will not assume that an absurd or unreasonable construction will be placed upon this section by the enforcement officers or the state courts.

(*b*) *The 7,000-pound net load limit is not discriminatory as between motor trucks handling freight and motor busses handling passengers, because the circumstances and conditions of operation are substantially dissimilar.*

The same rules of law which sustain the power of the Legislature to make the classification just referred to likewise authorize the distinction which is made between trucks and busses. On this point the Court's finding is as follows:

> "We find that in 1930 there were only 900 passenger busses operating over the highways of Texas, representing less than .004 of 1 percent of the total number of vehicles on the high-

ways of this state; that such passenger busses, while similar in many respects in construction to trucks carrying freight, are specially equipped to haul passengers, operate under regulations of the Railroad Commission and under conditions wholly different from that of trucks; that the difference between these two types of vehicles, and the number of each type, and in their operation is ample justification for legislative classification, and is reasonably related to the objects sought to be accomplished by this law; that since there is a great difference between the conditions under which the two types of vehicles are operated, that the Legislature may reasonably classify said vehicles and apply to motor trucks different regulations from those applicable to motor busses; and that therefore the provisions of this act regulating the speed are just, fair, reasonable regulations based upon differences between the respective classes above referred to; that since the operation of trucks is essentially different from the operation of busses, no unlawful discrimination is made against them because they are subject to different regulations with respect to net load, and we find that this difference between the two classes is reasonably related to the objects sought to be accomplished by this law." (R. 135-6, Finding XXII.)

Appellees' witness L. G. Phares, Chief of the Texas Highway Patrol, testified as follows, in distinguishing trucks and busses (R. 336-7):

"1. The number of motor busses in operation over the highways of this state is very small as compared to the number of trucks in

operation, the motor busses being about 900 in number and the trucks being over 200,000 in number. For this reason the trucks, of course, present more serious problems with regard to traffic congestion and traffic dangers upon the highways than do the motor busses.

"2. Practically all motor busses operate as common carriers and are under the direct supervision of the Railroad Commission of Texas, whereas great numbers of private trucks are wholly without regulation by the Railroad Commission of Texas. This results in several things:

"(*a*). The class of drivers operating motor busses, both with regard to skill and responsibility, is far above the drivers, as a class, operating motor trucks.

"(*b*). The equipment of motor busses with special reference to brakes, etc., is far superior to the average equipment of motor trucks and, from a mechanical standpoint, it is possible to operate motor busses which are larger than trucks and which are driven faster than trucks with greater safety than trucks of the same size and driven at the same rate of speed could be operated.

"3. Because of the above, especially the number of motor busses being operated over the highways, problems of traffic congestion with regard to operation by motor busses are by no means as serious as the congestion resulting from operation of trucks and [therefore] motor busses of greater size, width, length, etc., were permitted to operate over the highways.

"4. From the viewpoint of the necessity of the people as a whole and from the viewpoint of

serving the interests of the general public, it is necessary to permit larger motor busses operated at a greater rate of speed than is necessary or reasonable to be permitted in the case of trucks carrying freight. Conditions obtaining in motor transportation with reference to the interests of the public, comfort of the public, etc., warranting greater size for motor busses, do not obtain with reference to truck transportation.

"Accidents caused on the highways by motor busses are so few in comparison to the numerous accidents caused by trucks that a comparison of the relative traffic dangers resulting from the operation of the two classes of vehicles can not even be approximated."

In the same connection the witness G. A. Knapp (R. 284-5) testified that there is an inherent difference in the construction of motor busses and trucks, involving primarily the distribution of load, in consequence of which trucks are more damaging to highways than busses.

In respect to this classification, the Court below in its final opinion said (R. 124):

"The intercourse between the people of the State, and between them and the people of other States, for business, educational, and social purposes, is largely dependent upon the safe, rapid and dependable transportation of persons, and the Legislature may well have determined and decided, as they seem to have done, that the transportation of persons upon the highways should be favored over, and as against, the transportation of freight, and that while the transportation of persons for hire and the trans-

> portation of persons in private cars should be regulated, as provided by existing law, there should be no regulation of the load weight as in the transportation of freight. The Legislature may have determined, and doubtless did, that since the number of vehicles transporting persons for hire is so greatly less than those transporting freight for hire, the purposes of the Act, i. e. highway and traffic protection, would be met by limiting only the load weight of vehicles carrying freight. That the Legislature may lawfully do this, we have no doubt. *J. H. McLeaish & Co.* v. *T. Binford,* 52 Fed. (2d) 151 (and authorities cited)."

Appellants ingeniously argue that "the use of the highway by busses is more frequent than the use by trucks inasmuch as they are operated on more frequent schedules." They attempt to support this position by the introduction of buss schedules. Schedules cannot be made the basis of such a comparative estimate because there are only 364 persons and companies operating trucks on schedules (R. 370). (In Texas only common carrier trucks holding certificates of convenience and necessity operate on schedules.) The vast majority of the 206,000 trucks in Texas operate over the highways at will.

An example of the unparalleled use of the highways by trucks is found in the transportation of cotton. Approximately 23,000 truck loads of that commodity were moved into the City of Houston during the months of August, September and October, 1931 (R. 399).

It is too obvious to require discussion that the movement of only 900 busses over the highways of Texas is

insignificant in comparison with the operations of 206,000 trucks.

The classifications presented under this proposition are predicated upon substantial differences of fact. The judgment of the legislative body as to their necessity, affirmed by the trial court, should be sustained.

III.

The regulation limiting to 7,000 pounds the net load of motor vehicles having uniform and equal application to state and interstate traffic casts no undue burden on interstate commerce (Appellees' Reply to Appellants' Point III).

That the 7,000 pound net load limit is a reasonable and nondiscriminatory regulation in its general application to all highway traffic has already been shown. The question here presented is whether the limitation, although valid as to intrastate commerce and although it is applied uniformly to all classes of commerce, becomes invalid when applied to interstate commerce.

As we have shown, the trial court found that the preponderance of the evidence before it confirmed the legislative finding of fact that the 7,000 pound net load limit plus the weight of the vehicle was the maximum load that could be reasonably accommodated by the highways of Texas, taking into consideration the manner of past and present construction, probable future construction, cost of maintenance, strength of bridges, and traffic conditions generally (R. 134, Finding XIX).

We have also called attention to its finding that while there are a few highways and bridges in the State capable of carrying a greater load than 7,000 pounds, such highways do not form a regularly connected system and are scattered throughout the State; that the better type of highways are connected and joined by highways of a lower or inferior type and that transportation over such highways must conform itself to these general conditions. The Court further found that the operations of the vehicles of all complainants and intervenors and all others similarly circumstanced were conducted over all types of highways and bridges, excepting only intervenor Merchants' Fast Motor Lines whose entire route of operation was over a paved highway. (This carrier is engaged solely in intrastate commerce.) The Court further found that the provisions of the Act, including the net load limit of 7,000 pounds, were enacted by the Legislature in the interest of the whole State; for the benefit of the State in general; for the protection of the traveling public; for the protection of the State highway system in particular and that the operations of complainants and intervenors constituted only a small portion of the traffic which is borne by the highways (R. 134-5, Finding XX).

The Court found that there had been a 300 per cent increase in the number of trucks using the highways in the last six years and that this unusual increase in truck traffic justified the dimensional and weight restrictions of the act in the interest of public safety and highway conservation (R. 135, Finding XXI).

The Court found that excessively loaded trucks were damaging the highways and that a limitation of the net load to 7,000 pounds would result in a substantial saving to the State in its highway maintenance cost (R. 136, Finding XXIV).

The Court found that heavily loaded trucks, in addition to directly damaging the highways, had been and were from time to time causing accidents on the highways and that a reduction in the size of the load would greatly promote public safety and reduce damage to the highways. The Court specifically found that the net load limit of 7,000 pounds would have the effect of reducing traffic dangers on the highways and add to the public convenience and safety in the ordinary use of such highways (R. 136, Finding XXV).

The Court found that there is a direct relationship between the net load and gross load of motor trucks and that the restriction of the net load to 7,000 pounds bears a direct relation to highway safety, convenience and conservation. The Court specifically found that the net load limit of 7,000 pounds is a reasonable regulation (R. 137, Finding XXVII).

The Court found that the injuries which may result to complainants and intervenors from the enforcement of the provisions of the Act are only such as will naturally flow from a change in the law and the enforcement of valid regulations. The Court further found that said law is a fair and reasonable exercise of the police power under which the State has the right and power to regulate the length, width, height, speed and load of motor vehicles and combinations of motor vehicles (R. 137, Finding XXIX).

We have shown herein under Points I and II that the Court's findings of fact are sustained by the evidence. We shall not again discuss that question under this heading.

Appellants' Point III raises the question of the State's power to apply, to interstate operators of motor vehicles, the same reasonable police regulations promoting public safety and conserving its highways, which it applies to vehicles operating in intrastate commerce. The trial court found as a fact that the particular regulation covered by appellants' Point III, namely, the 7,000 pound weight limit, did promote public safety and did result in highway conservation. There is no question presented here of discrimination between inter- and intra-state traffic, for the 7,000 pound load limit is uniformly applicable to both.

This Court has held that the State may so exercise its police power in connection with interstate traffic over its highways in *Clark* v. *Poor*, 274 U. S. 554, in an opinion delivered by Mr. Justice Brandeis. That case concerned an interstate carrier of passengers between Indiana and Ohio. It involved a statute which required such carriers, prior to their operation, to obtain from the Public Utilities Commission of the State of Ohio a certificate to operate over its highways and required such interstate carriers to pay, at the time of the issuance of the certificate and annually thereafter, a tax graduated according to the number and capacity of the vehicles used. It was a common carrier and ignored the provisions of the Ohio statute and sought to enjoin the State from interfering with

its operations upon the ground that the Act as applied to it violated the Commerce Clause of the Constitution and that the State had no right to regulate interstate traffic using the highways of the State. Answering this proposition this court said:

> "The contrary is well settled. The highways are public property. Users of them, although engaged exclusively in interstate commerce, are subject to regulation by the State to insure safety and convenience and conservation of the highways."

The decision of this Court, which is specifically in point, is that of *Morris* v. *Duby, supra,* which directly involved weight limitations prescribed by the State of Oregon, and applied to interstate carriers. In that case the Highway Commission of the State issued an order that reduced the permitted loads of both state and interstate motor trucks using the highways. The gross load limit (including the vehicle and its load) was reduced from 22,000 pounds to 16,500 pounds maximum.[6]

It was also contended in that case that the Federal Highway Act lodged exclusive jurisdiction in the national government to regulate highways. The Court overruled this contention (page 143). In that case, opinion delivered by Mr. Chief Justice Taft, the Court

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[6]The net load of 7,000 pounds plus the weight of an average truck of 11,000 pounds makes a gross weight of 18,000 pounds permissible under the Texas Act (R. 270-1). This is a 1,500 pound greater maximum than approved by this Court in *Morris* v. *Duby.*

quoted with approval the following from *Buck* v. *Kuykendall:*

> "'With the increase in number and size of vehicles used upon a highway both the danger and the wear and tear grow. To exclude unnecessary vehicles—particularly the large ones used by carriers for hire—promotes both safety and economy. State regulation of this character is valid even as applied to interstate commerce, in the absence of legislation by Congress which deals specifically with the subject. * * *,'"

And then added:

> "The mere fact that a truck company may not make a profit unless it can use a truck with load weighing 22,000 or more pounds does not show that a regulation forbidding it is either discriminatory or unreasonable. That it prevents competition on parallel steam railroads may possibly be a circumstance to be considered in determining the reasonableness of such a limitation, though that is doubtful, *but it is necessarily outweighed when it appears by decisions of competent authority that such weight is injurious to the highway for use of the general public and unduly increases the cost of maintenance and repair.*" (Italics ours.)

In the instant case, this Honorable Court has before it the judgment of the Legislature of Texas that a load of more than 7,000 pounds is injurious to the highways and that it endangers the public safety. It has a finding of fact unanimously concurred in by a three-judge Federal Court sustaining the judgment of the Legislature. Therefore, whatever may be the facts

with regard to the inability of complainants and intervenors to operate their equipment at a profit, it is established beyond controversy that the regulations prescribed by the State are designed to and do in fact relate to subject-matters unquestionably within the legislative power, namely, the promotion of public safety and the conservation of the highways constructed with public funds. In *Morris* v. *Duby*, this Court accepted as final the judgment of the Oregon Highway Commission on the necessary limitation for highway conservation and public safety in that State. In the instant case, this Court has the judgment of the Legislature, confirmed by the unanimous judgment of the court below, that the net load limit of 7,000 pounds bears a direct relation to public safety and highway conservation. Therefore, since it is of uniform application to both state and interstate traffic, it is not subject to the objection that it casts an undue burden upon interstate commerce. *Hendrick* v. *Maryland*, 235 U. S. 610; *Johnson Transfer Co.* v. *Perry*, 47 F. (2d) 901; *Sprout* v. *South Bend*, 277 U. S. 169.

IV.

Section 5 of the act accomplishes the same final result in so far as appellants are concerned as section 3 (f). All questions with reference to that section are moot and not essential to the disposition of this cause.

Section 3(*f*) is that provision which limits the load of any one vehicle or combination of vehicles to fourteen articles exceeding in volume 30 cubic feet and weighing more than 500 pounds each.

This section prohibits the transportation by motor vehicle over the highways of more than fourteen of such articles on any one load only in those instances where the container exceeds 30 cubic feet in dimensions and weighs more than 500 pounds. It is obvious, therefore, that fourteen or more of the containers or articles covered by this section would exceed the 7,000 pound load limit.

Section 5 of the Act prohibits on and after January 1, 1932, the transportation of any load by motor vehicle or combination of vehicles which shall exceed 7,000 pounds in weight. It is apparent that Section 5 prohibits the transportation of more than thirteen of such containers as are described in Section 3(*f*). That section, therefore, limits the load of both compressed and uncompressed cotton and all other such commodities to thirteen bales and eliminates all questions of classification between the two characters of cotton (see Appellant Steven's brief, pages 6, 15, 16, 17, 18). The Court below sustained in every particular the general limitation of the net load of 7,000 pounds per vehicle or combination of vehicles. (R. 133-40, Findings, XII, XIX, XX, XXIV, XXVI, XXVII, XXIX. Conclusions of law, XXXVII, XXXVIII.)

With reference specifically to Section 3(*f*), the Court below found that when it is construed in connection with the remainder of the statute it is a reasonable classification relating to safe transportation over the highways, and specifically found that Section 3(*f*), when construed and considered independent of the provisions of Section 5, had no just relation to the supposed mischiefs to be remedied and that it was un-

reasonably and unlawfully discriminatory and oppressive to intervenor W. T. Stephens. (R. 133, Finding XV; R. 140, Conclusion of Law XXXIX.)

It is the contention of the State that, in view of the findings of fact and the conclusions of law of the court below, nothing is presented on appeal for consideration by this Court which in any way concerns Section 3(*f*). The State has not prosecuted a cross appeal for the obvious reason that the general provisions of the Act accomplish the desired ends of regulation in the interest of highway conservation and highway safety.

The question presented by appellants' Point IV, relating to Section 3(*f*), is similar to the proposition submitted to this Court in the case of *United States* v. *Alaska Steamship Company*, 253 U. S. 113, opinion delivered by Mr. Justice Day. In that case the Court had before it certain orders of the Interstate Commerce Commission relating to export and domestic bills of lading. The order of the Commission was dated March 14, 1919. The Transportation Act of 1920 prescribed new regulations and enlarged the power of the Commission to deal with the question of bills of lading. In disposing of the case, the Court said:

> "It is true that the determination of it underlies the right of the Commission to prescribe new forms of bills of lading, but it is a settled principle in this Court that it will determine only actual matters in controversy essential to the decision of the particular case before it. Where by an act of the parties, or a subsequent law, the existing controversy has come to an end, the case becomes moot and should be treated

> accordingly. However convenient it might be to have decided the question of the power of the Commission to require the carriers to comply with an order prescribing bills of lading, this Court 'is not empowered to decide moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it.'"

The principle there announced by this Court is precisely in point on the question here presented. We contended before the trial court that Section 3(*f*) was valid in and of itself. The court below did not agree with that contention, but held the section valid when considered in connection with Section 5. Hence, the question presented by appellants' Point IV is moot, for the reason that a decision of it is unnecessary to the disposition of the constitutional questions presented in this cause.

What we have said disposes of appellant Stevens' argument relating to Point IV. We cannot pass, however, without directing attention to the examples used at pages 15 to 18 of his brief, designated carriers A, B, C, D and E. The illustrations there made are purely hypothetical, and are based upon the erroneous assumption that the present load limit in Texas is 30,000 pounds. In truth, such an illustration could not be accurately applied to the former law, and it is entirely out of place in view of the present load limit of 7,000 pounds.

V.

There is no showing of discrimination or arbitrary regulation applicable to any class by reason of the provisions of the Act. All persons and property within the classifications created by the Bill are treated uniformly and alike (in answer to Appellants' Point V).

The classifications created by the Act in question and covered by appellants' Point V are:

First. Section 3(*a*) of the Act limits the width of motor trucks making a general use of the highways to 96 inches and permits farm tractors which do not exceed nine feet in width to be temporarily propelled over the highways.

Second. The same section of the Act permits implements of husbandry, machinery used solely for the purpose of drilling water wells, and highway building and maintenance machinery, which exceed the width, length and height provisions of the Act, to be temporarily propelled over the public highways.

Third. Section 3(*c*) limits the length of motor trucks making a general use of the highways to 35 feet for single units and to 45 feet for any combination of units, whereas Section 7 provides that motor trucks making a limited and restricted use of the highways, necessary for the purpose of transporting commodities to and from the nearest practical common carrier receiving or unloading station, may be 55 feet in length, either in single or combination units.

The findings of fact of the court below sustained these classifications as reasonable, necessary and proper regulations of highway traffic by the State in the interest of highway safety and conservation. The court likewise found that the limitations of length, width and height per vehicle and combination of vehicles were reasonable requirements and directly related to these purposes (R. 133, 135; Findings XIV and XXI).

With reference to implements of husbandry, water well drilling machinery and highway construction and maintenance machinery, the Court found as follows:

> "We further find that in order to carry on the business of farming, implements of husbandry, plows, threshing machines, hay presses, etc., must be moved from one farm or place to another; that the highways of this state are used only temporarily for this purpose; that the same is true of water well drilling machinery, and highway construction machinery; that these uses of the highways are temporary only and essential to public welfare; that while some of these implements exceed the dimensions prescribed for trucks, their use of the highways is negligible and is not authorized except for the purpose of transporting the same for use in husbandry and road construction and for the purpose of drilling water wells, and that the exception made in Section 3 of the Act with reference to these implements and machines is a reasonable classification and is fairly related to the objects sought to be accomplished by this law, and that complainant and intervenors are not

similarly situated or circumstanced to the persons who make such temporary use of the highways" (R. 137-8, Finding XXX.)

In support of the classification created as between motor trucks making a general use of the highways and those used in transporting to and from common carrier stations, the Court found as follows:

> "We find that the average distance traveled by trucks carrying property from points of origin to common carrier receiving points or from common carrier unloading points to destinations is from four to eight miles; that these hauls are universally short; that such operations are confined to small areas and greatly reduce the danger of traffic congestion or highway injury incident to truck transportation; and the Court finds that those transporting under the exceptions permitted by Section 5(*b*) [7] of the Act do so under distinctly different circumstances and conditions from complainant and intervenors who transport over fixed routes, and from other persons using the highways, and that these differences justify the classification which is made by the Legislature; we find further that this exception will have the effect of diverting from the highways generally a great deal of traffic which will have the effect of reducing highway congestion and danger, and that for this additional reason such classification is just, fair and reasonable" (R. 138, Finding XXXI).

These findings of fact of the Court below are amply sustained by the evidence of record. (Witnesses Locket, R. 342-3; Bentley, R. 388; Waggoner, R. 328-30; E. C. Kinkaid and others, R. 381-6.)

There is no contention, and there can be none, that any discrimination exists within the different classes under discussion. The contention is that, as between motor trucks transporting property generally and extensively over the highways and farm tractors, implements of husbandry, etc., "temporarily propelled" thereon, there is an unjust and improper classification favoring the latter.

The findings of fact in each and every instance sustain the classifications created by the law and establish that there are substantial and reasonable distinctions between motor trucks making a general use of the highways and vehicles, including motor trucks, making a limited use of the highways. The general rule of this Court with reference to the right of the State to classify persons, objects and commodities in the exercise of its police power was stated in *German Alliance Insurance Company* v. *Lewis*, 233 U. S. 389-418, in the following language:

> "A legislative classification may rest on narrow distinctions. Legislation is addressed to evils as they may appear, and even degrees of evil may determine its exercise."

Similar rules and specific applications of this rule may be found in *Radice* v. *People of the State of New York*, 264 U. S. 292-297-298; *Heisler* v. *Thomas Colliery*, 260 U. S. 245; *Carley & Hamilton* v. *Snook*, 281 U. S. 66; *Lindsley* v. *Natural Carbonic Gas Company, supra; Keokee Consolidated Coke Company* v. *Taylor*, 234 U. S. 224. In the case of *Carley & Hamilton* v. *Snook*, at pages 72 and 73, the Court said, with

reference to specific regulations governing highway traffic and a specific classification of that traffic:

> "Only a word need be said of petitioner's contention that the exemption of all vehicles weighing less than 3,000 pounds, although their loaded weight may be much more than vehicles not exempt, infringes the equal protection clause of the Fourteenth Amendment * * * That the Legislature may graduate the fees according to the propensities of the vehicles to injure or destroy the public highways, and may exempt those with respect to which this tendency is slight or non-existent, cannot be doubted. We may not assume that vehicles weighing less than 3,000 pounds, with their accustomed burden added, do not have this tendency. It is for the legislature to draw the line between the two classes."

The Supreme Court has sustained various classifications of the several State Legislatures upon narrow distinctions as between the respective classes before it. An instance of this character is the Chain Store case, *State Board of Tax Commissioners of Indiana* v. *Jackson*, 51 Sup. Ct. Rep. 540, and the recent case of *Packer Corporation* v. *State of Utah*, decided Feb. 23, 1932. It is our contention that the right of the State to classify in the instant case deserves much stronger support than might ordinarily be true, for the reason that it is here seeking to protect the public interest in the safe use of its highways and is by means of this Act undertaking to conserve its highways which were constructed at great expense and which are maintained

by burdensome expenditures of public funds.[7] A proper regulation of the highways thus created and maintained for the general good of the public must of necessity involve many different classifications.

Appellants' proposition would require the State—in order to permit a farm implement in excess of 9 feet in width to cross one of its highways in going from one field of operation to another—to authorize all vehicles using the highways to be 9 feet in width. Appellants would have the Court ignore the fact that the widths of the highways[8] are not such as to accommodate generally such character of vehicles. Under certain conditions and in a limited way, the requirements of the people necessitate the use of vehicles in excess of 45 feet in length and vehicles permitted to carry in excess of 7,000 pounds. To meet these limited, though necessary, requirements, the Legislature has made an exception to the general provisions of the Act, but has limited the length of the vehicles included in the exception to 55 feet and the load which they may carry to 14,000 pounds. Appellants' contention, however,

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[7]State Designated Highways constitute only 18,500 miles of the State's 200,000-mile system of public highways. The maintenance cost for this 18,500 miles alone is $12,000,000 annually. The maintenance cost for the balance of 180,000 miles is borne by the several counties, and amounts to many millions annually (R. 133-4, Findings XVI-XVII).

[8]The maximum width of traffic lanes in Texas is 10 feet, and most of them are only 8 or 9 feet. Thus vehicles 90 inches wide occupy all but 2½ feet of a 10-foot lane, all but 1½ feet of a 9-foot lane and all but 6 inches of an 8-foot lane (R. 338).

would require the State to permit all persons using the highways—without regard to the public safety or highway protection—to transport excessive weights and to use vehicles of unusual length, simply because the interest of the people necessitates the limited use which is authorized by the exception. The State is not driven to any such extremity by the equal protection clause of the Constitution.

The Court below specifically found that Section 7, which makes an exception in favor of short hauls to and from the nearest practical common carrier station, results in a use of the highways which does not exceed on the average a maximum of more than 8 miles on any given haul. The average haul for the whole State is found to be only 4 miles (R. 329). It further found that this exception does not interfere with the State's general plan for the promotion of public safety and highway conservation. Nevertheless, appellants contend that all motor trucks, operating over routes utilizing the entire highway system, should be permitted to handle unusual and excessive weights merely because the State has authorized such transportation to the limited extent necessary to move commodities from areas without transportation to the nearest point where such transportation may be obtained. Surely a classification based upon the distinction between a limited use of the highways versus a general and extensive use of the highways is one which comes well within those approved by this Court. The differences justifying classification in the exercise of the police power of a State have, as this Court has

stated, rested upon narrow limits and have been sustained as lawful and proper upon narrow and limited distinctions of fact. In the instant case the bases of fact for the classifications are substantial. They are sustained by the judgment of the Legislature and are confirmed unanimously by the trial court. The judgment of both is fully supported by the evidence of record.

It is important to observe that no injury is shown to result to appellants from any one of the three classifications presented by Point V. There is no competition and therefore no possibility of a loss of business or injury of any character to any of the appellants from the classifications which have been made between motor trucks making general use of the highways on the one hand, and farm implements, farm tractors, water well drilling machinery and highway construction and maintenance machinery making only a limited use of such highways on the other. None of the complainants or intervenors are engaged in a business which utilizes such vehicles; neither are they engaged in any way in the transportation of such vehicles. All of the vehicles classified by the Act are treated uniformly and without discrimination. Since there is no relation between the respective vehicles in the respective classifications, there cannot be any injury to these appellants which would support a finding that the Act is arbitrary, unjust or unreasonable.

The Texas Court of Criminal Appeals in the case of *Cecil Reaves v. State of Texas*, 40 S. W. (2d) 150, interpreted the exception relating to farm implements, farm tractors, etc., as not providing an exception in

connection with the transportation of farm products in a motor vehicle over the highways and specifically held that such exception related only to farm implements, implements of husbandry, etc., devoted to the purpose of husbandry. In that case the Court sustained a conviction of a farmer transporting farm products in his own motor truck, which was greater than 45 feet in length, on the ground that the exception in question did not cover a motor truck used in such transportation.

The statement of appellants that the Supreme Court of the State has not passed on this question is misleading because it creates the impression that the State court of last resort has not passed on the matter. The court of last resort having jurisdiction of the cause has interpreted the particular section of the Act contrary to appellants' contention. The Court of Criminal Appeals in the *Reaves* case did pass on this question and it is the court of last resort in criminal matters. It upheld a conviction of a farmer doing precisely what appellants contend may be done with immunity. There is no appeal from its judgment to any other State court. Therefore, there is no basis of fact to support appellants' statements that 5,000,000 bales of cotton and 70,000,000 bushels of wheat may be transported by farmers in their own vehicles under this section.

The distinction made between motor trucks making a general use of the highways and those using the highways to transport commodities to and from a common carrier station, is further justified because all

of the appellants may avail themselves of any benefits it may confer. Like all others, when their vehicles are engaged in the transportation of commodities to and from a common carrier station, they may operate under the exception stated in the Act. Thus there is no classification and no discrimination as between such vehicles. All motor vehicles, when operating in the general transportation of property over the highways, are subject to uniform regulations which have equal application to everyone so engaged. All motor vehicles, whether those of the appellants or not, when engaged in the transportation of commodities to and from a common carrier station, are subject to and permitted to operate under the exception. The classification, therefore, is based upon the difference in the character of use which is made of highways, and is not a classification as between persons or motor vehicles operated thereon. The situation here is not different in principle from *Clark* v. *Maxwell,* supra.

We submit that the judgment of the Legislature and the trial court should be sustained.

VI.

Section 2 definitely establishes the basic rules which govern the administrative officers charged with the enforcement of the act. There is no discretion resting in such administrative officers which permits the changing, altering or suspending of the provisions of the law (in answer to appellants' Point VI).

Section 2 prohibits the operation of vehicles exceeding the dimensions and weight limitation prescribed

by the Act. These general prohibitions refer to the load limit prescribed by Section 5 and the maximum width, height and length provisions contained in Paragraphs (*a*), (*b*) and (*c*) of Section 3. They limit the weight to 7,000 pounds, width to 96 inches, height to 12 feet 6 inches,[9] and length to 35 feet for single units and to 45 feet for combinations of units.

This section also makes it the duty of the Highway Commission and its authorized agents in the several counties to issue special permits for the movement of overweight, oversize or overlength commodities which cannot be reasonably dismantled, including the use of oversize equipment when necessary for that purpose. It is provided that such hauls shall be made by the shortest practicable route. The transportation of such commodities or the use of such equipment without a special permit is made a misdemeanor.

The legislative purpose in providing for the issuance of special permits is made entirely clear by the testimony of the witness E. C. Kincade (R. 381-6). Heavy machinery used in industry, farming implements such as farm tractors and threshing machines, oil field equipment, telephone poles and the like, practically all of which exceed one or more limitations of the Act must be moved over the highways to a limited extent.

We quote the Court's findings with reference to this section:

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[9]There are approximately 300 underpasses and bridge portals on State-Designated Highways having a clearance of less than 12 feet, 6 inches (R. 338, 375).

"We further find that under the terms and provisions of Section 2 of the Act, it is made the mandatory duty of the Highway Commission of Texas to grant permits for the transportation over the highways of such oversize, overlength or overweight commodities as cannot be reasonably dismantled, and for the operation over said highways of extra heavy and oversize equipment in connection therewith; that there are a number of commodities in this State such as boilers, transformers, telephone poles, etc., as cannot be reasonably dismantled; that it is necessary to transport such commodities; that the duty imposed upon the Commission by said Section is not a delegation of power to suspend the laws of the State of Texas, nor does said provision delegate legislative power to the officers of the State; that the Commission in the performance of the duty of issuing special permits is acting as a fact finding body and in an administrative capacity, and that the classification is a fair and reasonable one, and that a certain and definite standard or guide is prescribed as the basis of determining whether or not such special permits shall be granted" (R. 138-9, Finding XXXII).

Appellants contend that the issuance of a special permit will constitute a suspension of the law, and that the section itself is a delegation of legislative authority. In support of this contention they rely upon *Ex parte Faison*, 248 S. W. 343. That case is not in point, because the statute there under consideration was not open to the construction which has been placed upon Section 2 of this Act. The statute in that case

permitted administrative officers to exercise independent discretion in matters purely legislative in character relating to highway conservation. Without defining or providing any legislative guide it left to the judgment of such officers the important question of what constituted "material injury to the highways." The exception itself provided no rule or guide and authorized such officers to fix such weight limit, length, height or width as in their judgment would not "materially injure the highway." The instant case, as stated in the opinion of the trial court, is controlled by the case of *Trimmer* v. *Carlton*, 296 S. W. 1070, and authorities there cited. In that case, at page 1082, the court said:

> "• • • that it is not a delegation of legislative power in violation of the [Texas] Constitution to grant to some designated body powers which the Legislature cannot itself practically and efficiently exercise. Authorities, supra. In other words, that the exercise of that particular type of authority is read as an exception into the general language of limitation of the Constitution. It is merely tantamount to saying that the Constitution itself does not require the impracticable or the impossible. • • •"

The trial court, in its opinion denying the temporary injunction, discussed Section 2 as follows (R. 115):

> "The plain purpose is to permit and make provision for the transportation over the highways of those commodities, extraordinary in length, weight, or size, which (and the equipment upon which they are handled) cannot be

reasonably dismantled, and which are not every-day, but are unusual, loads, and which, but for this or some similar provision, could not pass over the highways at all. The authority given by this section to the highway department and its agents in each county is not to suspend the laws, as was the power conferred, or attempted to be conferred, upon the highway department in *Ex parte Faison*, 93 Tex. Cr. R. 403, 248 S. W. 343, but is of a fact-finding and administrative nature. *Trimmer* v. *Carlton*, 116 Tex. 591, 296 S. W. 1070, and cases there cited. Texas Jurisprudence, vol. 9, paragraph 70, and cases cited in footnotes. Ruling Case Law, vol. 6, paragraphs 175 and 179. The particular fact to be found is whether the commodity or equipment is of such nature as cannot be reasonably dismantled. If it is found to be, it is exempt from the requirement as to length, weight or size, and permit may issue for it to be moved over the highway, but with a well-defined limitation as to route and time. It may be conceded that it is often difficult to define clearly the line between those legislative acts where power to suspend a law is given, or attempted to be given, and those where power of fact-finding or administration is given. We think that Section 2 of this Act does not violate Section 28 of Article I of the Texas Constitution, and is valid."

The Attorney General of Texas has construed the law in a like manner, and that opinion is of record before the Court. We quote pertinent parts thereof:

"The Commission has no discretion where the facts exist which are described in the Act. If the commodities cannot be reasonably dis-

> mantled, then the permit should be issued as a matter of right. In the performance of its duty, the Commission, through its agents, is acting as a fact-finding body and in an administrative capacity (R. 378).
>
> "It may be well to observe at this point that the Commission is without power or authority to grant a permit when the commodity can reasonably be dismantled" (R. 379).

The cases cited are in harmony with the decisions of this Court. The Supreme Court has uniformly held that the provisions of a statute, which within themselves define the limitations which shall govern an administrative body or an administrative officer, are not delegations of legislative power and are not authorizations to suspend criminal laws. In the case of *Union Bridge Company* v. *United States,* 204 U. S. 364, opinion delivered by Mr. Justice Harlan, the Court had before it a criminal prosecution resulting from the violation of administrative orders issued by the Secretary of War concerning a bridge over the Allegheny River. The Act of Congress prohibited bridges over navigable streams which obstructed navigation. The Secretary of War was charged with administrative duty of determining whether any bridge did in fact obstruct navigation. He found that the bridge interfered with navigation and ordered modifications thereof so as to permit unrestricted navigation. The bridge company ignored his order and contended that it was invalid, because the statute which conferred the authority to make the order in question was itself invalid because it delegated legislative

powers to an administrative officer. This Court, at page 378, stated that the matter presented was important and justified a full reference to prior decisions. Without reviewing them here, we quote from that opinion at page 386:

> "Congress, in execution of a declared policy, committed to the Secretary of War the duty of ascertaining all the facts essential in any inquiry whether particular bridges, over the waterways of the United States, were unreasonable obstructions to free navigation. Beyond question, if it had so elected, Congress, in some effective mode and without previous investigation through executive officers, could have determined for itself, primarily, the fact whether the bridge here in question was an unreasonable obstruction to navigation, and, if it was found to be of that character, could, by direct legislation, have required the defendant to make such alterations of its bridge as were requisite for the protection of navigation and commerce over the waterway in question. But investigations by Congress as to each particular bridge alleged to constitute an unreasonable obstruction to free navigation, and direct legislation covering each case, separately, would be impracticable, in view of the vast and varied interests which require national legislation from time to time. By the statute in question Congress declared in effect that navigation should be freed from unreasonable obstructions arising from bridges of insufficient height, width of span, or other defects. It stopped, however, with this declaration of a general rule, and imposed upon the Secretary of War the duty of ascertaining what particular

> cases came within the rule prescribed by Congress, as well as the duty of enforcing the rule in such cases. In performing that duty the Secretary of War will only execute the clearly-expressed will of Congress, and will not, in any true sense, exert legislative or judicial power."

The application of the above quotation to the instant case is striking. It might be physically possible in each instance for the State Legislature to conduct investigations and determine when a telephone pole is more than 45 feet in length and determine whether or not it can be reasonably dismantled. It may be just barely possible it could do the same with reference to all other commodities and determine in each instance whether they are overweight or oversize. For it to undertake such a course would be impractical and unnecessary. Instead, as in the *Union Bridge Company* case, the legislative body laid down the rule which shall govern the administrative officers and provided that where an article could not be reasonably dismantled and it was overweight, overwidth or overlength, the transportation of that commodity would be permitted, but that a permit from an administrative officer must be obtained in order that the facts with regard to the particular commodity might be determined in advance of its transportation. The administrative officers in the instant case have no discretion with regard to the transportation of commodities generally. They are not permitted to suspend the 7,000-pound weight limit, the 96-inch width limit or the 45-feet length limit, even if, in their judgment, it might seem just or wise to do so. They are permitted to grant the permits only upon

the basis of the judgment of the legislative body which definitely restricts them to those commodities which cannot be dismantled.

Where the law itself defines the duty of the administrative body, it has been uniformly held that the performance of that duty in determining the facts as to whether or not it should be exercised, did not constitute a delegation of legislative power or an authority to suspend the legislative will. See *United States* v. *Pierre Grimaud,* 220 U. S. 506; *Red "C" Oil Manufacturing Co.* v. *Board of Agriculture of North Carolina,* 222 U. S. 380; *Interstate Commerce Commission* v. *Goodrich Transit Co.,* 224 U. S. 194; *Kansas City Southern Railroad Co.* v. *United States,* 231 U. S. 423; *Mutual Film Corporation* v. *Industrial Commission of Ohio,* 236 U. S. 230; *Hampton* v. *United States,* 276 U. S. 394.

We most respectfully submit that the function of the administrative officers in the instant case is that of determining whether or not an oversize or an overweight article can be dismantled, and that this function is that of a fact-finding body and not that of a legislative body. Under such circumstances, the authority delegated to the administrative officers of the State by Section 2 of the Act is a constitutional exercise of the legislative power, and the judgment of the Court below on this point should be affirmed.

VII.

The trial court did not err in admitting calculations and compilations of safe loadings of bridges made by an expert witness from a personal examination and comparison with the records of the State Highway Department (in answer to Appellants' Point VII).

The witness, George A. Knapp, qualified as an expert engineer, including highway engineering, structural designing and contracting, and as an engineering statistician (R. 287). In the affidavit to which the objections here under discussion were made, the witness incorporated his qualifications above referred to by reference (R. 272-3). The witness testified that about the year 1925 the State Highway Department began a series of surveys covering different bridges which had been acquired by the State from the different counties of the State; that each of these surveys pertained to only one bridge; that from these surveys computations were made by the Highway Department of the safe loading of the bridges covered by these surveys. The witness further testified that he made an examination of these records of the Highway Department; that the total number of such surveys of existing bridges was 122, which constituted all of the existing bridges on which the Highway Department had made surveys; that he had made a compilation of this data showing each bridge by the number assigned thereto by the Department, the location of each such bridge by highway number, county, town and stream

crossed, the safe load of the bridge in tons, and whether the bridge was a one or two way bridge (R. 272-9). Thereupon this compilation attached to the witness' affidavit was offered in evidence (R. 272), to which the appellants objected for the reason that the same was "not admissible for any reason, hearsay, and not the best evidence" (R. 272), which objection was overruled by the Court and to which the appellants excepted (R. 272).

The fact to be proved by the compilation, as shown by the next to the last column thereof, was that there were certain of said bridges which could not safely support the weight of a vehicle or combination of vehicles carrying a net load of 7,000 pounds.

It is obvious that separate surveys and files on each of 122 separate bridges, each involving the structural plans of a particular bridge and the engineering calculations as to what the safe carrying capacity of each of said bridges was, consisted of such voluminous matter that it could not be conveniently examined in court. The fact to be proved consisted of the general result of an examination of the whole collection of records which could be ascertained only by calculations. The witness was skilled in such matters and had personally examined all of the documents himself and made therefrom the compilation in question. Under such circumstances, the originals need not be produced unless the Court deems it necessary.

Jones, in his *Commentaries on Evidence,* states the rule thus:

> "* * * where the originals consist of numerous documents which cannot be conveniently ex-

amined in court, and the fact to be proved is the general result of an examination of the whole collection, evidence may be given as to such result by any person who has examined the documents and is skilled in such matters, provided the result is capable of being examined by calculations. This has been permitted when any other course would cause great loss of time and would tend to confuse the jury; and competent witnesses have been allowed to summarize the accounts and to state conclusions as to balances, and the like. Of course, the court may require the production of the originals if this is deemed necessary but where it appears that the witness has examined the accounts he is permitted to give oral testimony as to the balances, solvency and insolvency as shown by the books, and the result of his examinations. In other cases, however, such evidence has been rejected'' (*Jones Commentaries on Evidence,* Second Ed., Vol. 2, p. 1452, Sec. 787).

This rule was followed by this Court in *Burton* v. *Driggs,* 20 Wall. U. S. 125, 22 L. Ed. 297, and in numerous other cases.

The evidence objected to was admissible under another line of authorities. The documents on file with the Highway Department from which the compilation was made obviously did not form any part of the basis of the action here involved. Viewed from any angle, the fact to be proved by the testimony here objected to constituted a collateral matter. It was, therefore, not properly subject to the objection made. It is generally held that where the contents of a writing are not directly in issue, the matters contained in

the writing may be proved by parol evidence without accounting for the failure to produce the writing. *Parker* v. *Chancellor,* 78 Tex. 524, 527, 15 S. W. 157; 1 *Greenleaf,* Sec. 5630; *Scullin* v. *Harper,* 78 F. 460; 17 *Texas Jurisprudence,* Sec. 190; 22 *C. J.* 1015.

Even should it be admitted, for the purpose of argument, that it was error to admit the testimony here in question, nevertheless such error was harmless. Similar evidence was offered and admitted from other witnesses without any objection having been made thereto.

The witness R. A. Thompson testified:

> "From my information and experience in the Highway Department, bridges that have been recently built within the last, say ten years, have been built to carry safely much heavier loads than bridges formerly built, particularly those bridges that were inherited by the State Highway Commission on the counties on the old county roads. We have a great many of those bridges in the state, built on much weaker specifications and designed to carry much lighter loads than what we term present-day loads, and many of those bridges are overloaded under the present traffic and are dangerous. The Highway Department has, in a number of instances, posted signs on these bridges warning the people, who are driving trucks or heavy loads, against putting loads over them heavier than certain specified weights. In other words, there will be a sign on it 'Bridge not safe for loads in excess of five tons.' A great many bridges in this State have been placarded with signs of that kind by the State Highway Department.

"That takes into account a safety factor; it is essential, some safety factor is taken into account. If you multiply loads from day to day over the particular bridge that is considered weak, in excess of the load that is regarded as within the safety factor, you substantially increase the hazard of the bridge breaking down" (R. 309).

The witness J. M. Howe also gave testimony of a similar nature going to establish the exact fact which the witness Knapp's testimony was offered to show:

"Another factor of importance is the strength and load capacity of the bridges in the highway system. There is a wide variation in the character and strength of the bridges in the highway system of Texas, many of them being bridges originally constructed primarily for horse-drawn vehicles, and not of sufficient capacity to take care of present loads. The State designated highways include a good many bridges that have not been reconstructed, and many more exist in the county highways not forming a part of the State designated system. Taking into account the size of vehicles used in commercial traffic and the weight of loads carried thereon, it seems to me that the maximum of 7,000 pounds, net load, is certainly not unreasonably low" (R. 320).

There is nothing in the record to show that the admission of such testimony had any effect upon the court. The court mentions bridges in its findings of fact in two places only, in Paragraphs XIX and XX (R. 134-5) where bridges are included only incidentally

and along with many other factors going to show that 7,000 pounds was a reasonable net load limit. The Court nowhere finds that there was any given number of bridges which will not carry 7,000 pounds, which is the sort of finding that would have been made had it been materially influenced by the testimony here objected to. For this additional reason, therefore, we submit that even though the Court erred in admitting the testimony, the error was harmless.

VIII.

All contracts for transportation over public highways are made subject to the inherent power of the state to enforce reasonable regulations in the interest of highway protection and safety (in answer to Appellants' Point VIII).

Appellants' contention in Assignment VIII is that Sections 5 and 2, limiting the loads and dimensions of trucks, impair the obligation of contracts contrary to Section 10 of Article 1 of the United States Constitution.

It has already been shown in the discussion of other points that the Act in question is an exercise of the State's police power. This power is inherent in the State and cannot be abridged or contracted away. Its exercise cannot be modified or interfered with by private arrangements or agreements. Contracts of the nature entered into by Appellants are not protected by this constitutional provision. *Morris* v. *Duby, supra; Boston Beer Company* v. *Massachusetts,* 98

U. S. 25; *Butchers Union Company* v. *Crescent City Company*, 111 U. S. 746; *New Orleans Public Service* v. *City of New Orleans*, 281 U. S. 682; *Hendrick* v. *Maryland*, 235 U. S. 610.

IX.

The act is remedial in nature and should be liberally construed. The legislative intent that its several provisions should be divisible is clearly expressed (in answer to Appellants' Point IX, not of Record).

While we think there is no doubt of the validity of the Act in its entirety, appellants' argument under Point IX calls for a discussion of the doctrine of severance.

That this is a remedial act is established by the authorities. It is designed to correct defects, mistakes and omissions in the administrative policy of the State. More specifically, it is a regulatory and administrative measure. The mere fact that penalties are prescribed for a violation of some of its provisions does not alter its character. The Acts of Congress regulating commerce between the States are conspicuous examples of this character of legislation. The Interstate Commerce Act prescribes severe penalties for violations of its provisions. In most instances they are more severe than those prescribed in the Act under consideration. In *United States* v. *Pacific & Arctic Co.*, 228 U. S., at pages 107-8, this Court said of the National Act:

> "* * * But it is more regulatory and administrative than criminal * * * and it

would, in our judgment, be an erroneous view to take that the great problems which the Act was intended to solve and the great purposes it was intended to effect should be considered of less consequence than the facility which should be given to some particular remedy, civil or criminal."

That this statute is remedial in its nature and should be liberally construed is supported by the overwhelming weight of authority in this nation. *Doering* v. *Walters*, 140 N. E. 74; *Smith* v. *People*, 51 Colo. 270; *State* v. *Lipkin*, 84 S. E. 340; *Ry.* v. *U. S.*, 232 Fed. 349; *Johnson* v. *Southern Pea Co.*, 196 U. S. 1; *Schlemmer* v. *Buffalo R. R. Co.*, 205 U. S. 1; *Southern R. R. Co.* v. *U. S.*, 222 U. S. 20; *San Pedro R. R. Co.* v. *U. S.*, 213 Fed. 326; *Great Northern Ry. Co.* v. *U. S.*, 218 Fed. 302; *Ry. Co.* v. *Voelker*, 192 Fed. 522; *Smith* v. *People*, 117 Pac. 612. This view of such a law has long been followed by the Supreme Court of the United States. In *Texas* v. *Eastern Texas R. R. Co.*, 258 U. S. 204, the Supreme Court limited the operation of Paragraphs 18, 19 and 20 of the Transportation Act of 1920 to interstate commerce. Its terms embraced and were intended to embrace intrastate and interstate commerce. It empowered the Commission to authorize by certificate the abandonment of a railway. Abandonment without such authority was made an offense punishable by a maximum fine of five thousand dollars or by imprisonment for not more than three years, or both. Notwithstanding the all-embracing language was contained in the very section

which fixed the penalty, the doctrine of severance was applied and the court, by construction, limited the scope of the Act to the field within the legislative power. On this point, at page 217, the court reaffirmed the rule announced in *U. S.* v. *Delaware and Hudson Co.*, 213 U. S. 366, 407-408. It quoted with approval from the latter case as follows:

> "'* * * where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.' * * *"

In *Johnson* v. *Perry*, 47 Fed. (2d) 900, the Georgia Motor Carrier Act was under consideration. Certain provisions of the Act were unconstitutional as to interstate carriers. The court granted only a conditional injunction allowing the Georgia Commission to enforce against the interstate carriers all provisions legally applicable to such a carrier.

The case cited is in harmony with *Clark* v. *Poor*, 20 Fed. (2d) 182. The Clark case involved the Ohio Motor Transportation Act, which contains certain provisions invalid as to interstate carriers. The district court denied an injunction, on the ground that the complainant had declined to comply with the valid provisions of the Act, contending that the whole law was void because of certain invalid provisions. In other words, the court separated the valid from the invalid provisions and recognized the power of the State to require an observance of the valid provisions

as to the interstate operator. The decree of the district court dismissing the bill was affirmed by the Supreme Court in *Clark* v. *Poor*, 274 U. S. 554, the Supreme Court protecting the right of the complainant to seek relief by another suit if he should be thereafter required by the Commission to comply with conditions of provisions not warranted by law.

See also *Brazee* v. *People*, 211 U. S. 340, in which a State law relating to employment agencies was involved, and *Kerry* v. *South Dakota*, 250 U. S. 119, where the migratory bird law was under consideration.

The rules of construction which are followed by the courts of Texas are in complete harmony with the decisions which have been cited. *Ex parte Curry*, 255 S. W. 730; *White* v. *Maverick County*, 35 S. W. (2d) 107; *Ex parte Wright*, 82 Tex. Crim. Reports, 247; *Ex parte Parr*, 200 S. W. 404; *Griffin* v. *State*, 218 S. W. 494; *Russell* v. *State*, 228 S. W. 566; *Scott* v. *State*, 233 S. W. 1097; *Goforth* v. *State*, 241 S. W. 1027; *Lytle* v. *Halff*, 12 S. W. 610; *Ex parte Towles*, 48 Tex. 413; *Chambers* v. *Baldwin*, 274 S. W. 1011.

There is another rule which it is important to consider in connection with the question of severance in this case. In Section 7 (5*b*) (R. 12) there is a clear expression of the Legislative intent with reference to its divisibility. Section 13 (R. 15) makes a similar statement with reference to each section, subsection, sentence, clause and phrase of the Act. It is clear the lawmakers intended the Act to be divisible. In the absence of such declaration, the courts do not feel

free to apply the rules of severance liberally unless that which remains after the process leaves the purposes of the Act substantially unaffected. *Williams* v. *Standard Oil Co. of Louisiana,* 278 U. S. 241. Where, however, there is such a declaration, the rule as announced in the case just cited is as follows:

> "The effect of the statutory declaration is to create in the place of the presumption just stated the opposite one of separability. That is to say, we begin, in the light of the declaration, with the presumption that the legislature intended the act to be divisible; and this presumption must be overcome by considerations which make evident the inseparability of its provisions or the clear probability that, the invalid part being eliminated, the legislature would not have been satisfied with what remains."

Appellants' contention that, if Section 2 is invalid, the whole Act must fall because Section 2 contains the prohibitory clause of the Act, is not well taken. Section 15(*a*) (R. 14) contains a separate and all embracing prohibitory clause which would make the Act complete without Section 2. The fact that there are two prohibitory sections, one containing an exception and the other not, considered in connection with the clear legislative expression that the Act should be divisible, is conclusive evidence that the Texas Legislature intended the Act should be severable, if necessary to meet any constitutional requirement.

Conclusion.

The decree of the lower court denying the prayers for injunction and dismissing the bills for want of equity should be affirmed.

Respectfully submitted,

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